contract is gone, and there is nothing left to support an action,[22] but since a petition for rescission in itself admits that there is a contract, until decree the contract continues to exist, and the plaintiff still has the choice of affirming it or else proceeding to decree, which would destroy it forever.[23]

DIVISIBILITY OF FIRE INSURANCE POLICIES.—It is a general rule that the severability of ordinary contracts, depending as it does upon the intentions of the parties[1] as gathered from the language used and from the nature of the subject matter,[2] is determined solely by the unity of the consideration or its apportionment to separate items, whether this is express or implied in law, irrespective of the number and variety of the items embraced in the subject matter.[3] The question, however, is presented in a peculiar and interesting form when the courts are called upon to decide whether an insurance policy is rendered void *in toto* by the breach of a condition or warranty affecting part only of the property insured. It is not indeed in policies providing for a premium in gross and making no separate valuation of distinct subjects of risk, nor yet in cases where the premium is apportioned to the different items at a separate valuation for each, that the difficulty arises. Clearly these contracts are entire and severable respectively.[4] The discussion may therefore be narrowed to the single case of a policy combining a distinct valuation of the separate classes of property with a premium in gross, a situation which often arises and which has been the occasion of much discussion and many varieties of judicial opinion.[5]

The fact that the premium is in gross is regarded in many jurisdictions as conclusive of the unity of the consideration, and therefore, in accordance with the general rule above stated, such policies are deemed entire contracts avoided *in toto* by any breach of condition or warranty.[6] But the consideration is not single and entire unless the parties so intended, and of this intention the gross premium is merely an indication. Accordingly, a large number of courts, following the leading New York case of *Merrill* v. *Agricultural Insurance Co.*,[7] emphasize the fact that the parties have placed a separate valuation on the various subjects of risk, and urge that since the part of the gross premium apportioned to each is easily ascertainable by means

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[22]It does not follow that beginning a suit in equity can never constitute an election. The filing of a suit for specific performance of a voidable contract would be a clear and unequivocal affirmance thereof.

[23]Cohoon *v.* Fisher (1896) 146 Ind. 583. This case contains an excellent discussion of the point. See also Brady *v.* Daly (1899) 175 U. S. 148.

[1]Hammon, Contracts, § 634.

[2]More *v.* Bonnet (1870) 40 Cal. 251; Pollak *v.* Brush Co. (1888) 128 U. S. 446.

[3]Wooten *v.* Walters (1892) 110 N. C. 251; Lucesco Oil Co. *v.* Brewer (1870) 66 Pa. St. 351.

[4]Fitzgerald *v.* Atlanta Home Ins. Co. (N. Y. 1901) 61 App. Div. 350.

[5]See 14 Harv. L. Rev. 301; 11 COLUMBIA LAW REVIEW 685.

[6]Friesmuth *v.* Agawam Ins. Co. (1852) 10 Cush. 587; Assoc. Fireman's Ins. Co. *v.* Assum (1853) 5 Md. 165; Plath *v.* Minn. Ins. Assoc. (1877) 23 Minn. 479; See Essex Bank *v.* Meriden Ins. Co. (1889) 57 Conn. 335.

[7](1878) 73 N. Y. 452.

of the rate of insurance, it is putting the form for the substance to call such contracts entire. They conclude that the parties regarded the gross premium as being simply a lump sum obtained by adding several amounts, each of which is paid in consideration of insurance on a separate class, the whole being united in one premium and under one policy, merely for the sake of convenience. Accordingly they hold that a breach avoids the policy only as to the particular class to which it relates.[8]

The New York doctrine that a separate valuation is conclusive of the severability of the policy seems eminently sound when applied to those cases where the condition does not affect the risk on the property insured, and where, in consequence, a breach relating to one class cannot in any way affect or increase the hazard upon the other classes. Here there seems to be no reason to assume that the parties regarded the entirety as the consideration or that the insurance company would have refused to take one risk without the others. An example of this group of cases is found in the late case of *Joffe & Mankowitz v. Niagara Ins. Co.* (Md. 1911) 81 Atl. 281. A policy making a separate valuation of a stock of merchandise and store fixtures, which contained a condition in the form of the usual "inventory and iron safe" provision, was held to be an entire contract. Here, inasmuch as such a condition in no way affects the risk and as its sole object is apparently to furnish evidence from which to determine the actual loss sustained, the separate valuation should have been decisive and the contract held severable.[9] But this doctrine does not afford a complete and satisfactory solution in the case of a stipulation such as a warranty of title or a condition against incumbrances, which directly affects the risk. In such a case, if the properties insured are so situated that the destruction of one is likely to involve that of the rest, obviously an increase of risk due to a breach as to one will increase the risk as to the others. It is therefore reasonable to assume that in determining the amount of the gross premium, the interdependence of the various risks was a strong factor, and that the parties regarded the entirety as the consideration.[10] This "identity of risk" doctrine furnishes the additional step beyond the New York rule which is necessary to adapt it to a class of cases where it would otherwise be inadequate. As thus modified, it is believed to be at once sound on the strictest principles of contract law and just to the parties concerned.

[8]Koontz *v.* Hannibal Savings Co. (1868) 42 Mo. 126; State Ins. Co. *v.* Schreck (1889) 27 Neb. 527; Ins. Co. *v.* York (1892) 48 Kan. 488; American Artistic Gold Stamping Co. *v.* Glen Falls Ins. Co. (1892) 48 N. Y. St. Rep. 653. It is, of course, nowhere denied that by unequivocal language the parties may make the policy indivisible, Smith *v.* Agricultural Ins. Co. (1890) 118 N. Y. 518, but even a provision that "this entire policy" shall be void for breach of condition or warranty is often held ineffectual to do so, Trabue *v.* Dwelling House Ins. Co. (1893) 121 Mo. 75; Knowles *v.* American Ins. Co. (N. Y. 1892) 66 Hun 120. Such a forced construction, however, seems hardly justifiable, even by the consideration that, the contracting parties being seldom on equal footing, the agreement should be construed against him who dictated its phraseology, Germania Ins. Co. *v.* Schild (1903) 69 Oh. St. 136; Germier *v.* Springfield Ins. Co. (1903) 109 La. 341.

[9]Miller *v.* Del. Ins. Co. (1904) 14 Okla. 81.

[10]Burr *v.* German Ins. Co. (1893) 84 Wis. 76; Brehm Lumber Co. *v.* Svea Ins. Co. (Wash. 1905) 79 Pac. 34; see Phenix Ins. Co. *v.* Parks Co. (1896) 63 Ark. 187.